

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. QWEST CORPORATION, Respondent.	DOCKET NO. FCU-03-12
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PROPOSED DECISION AND ORDER

(Issued April 14, 2004)

APPEARANCES:

MR. CRAIG F. GRAZIANO, attorney at law, 310 Maple Street, Des Moines, Iowa 50319, appearing on behalf of the Consumer Advocate Division of the Department of Justice.

MR. DAVID S. SATHER, attorney at law, 925 High Street, 9 S 9, Des Moines, Iowa 50309, appearing on behalf of Qwest Corporation.

THE ISSUES

Iowa Code § 476.103 (2003) provides that the Utilities Board (Board) may adopt rules to protect customers from unauthorized changes in telecommunications service. The same section provides that a change in service includes, among other things, the addition of a telecommunications service for which a separate charge is

made to a customer's account. Adding such an unauthorized charge is commonly called "cramming," which is defined in the Board's rules as "the addition or deletion of a product or service for which a separate charge is made to a telecommunication customer's account without the verified consent of the affected customer. . . . Cramming does not include telecommunications services that are initiated or requested by the customer." 199 IAC 22.23(1).

In this case, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) alleges that Qwest Corporation (Qwest) placed a charge of \$99 for jack installation and wiring on a customer's bill without authorization from the customer in violation of Iowa Code § 476.103. Qwest denies the allegation.

Iowa Code § 476.103(4) provides that the Board may assess a civil penalty against a service provider for violation of the section, its implementing rules, or a Board order issued pursuant to the section. The Consumer Advocate argues that the Board should impose a civil penalty on Qwest for the alleged violation to deter future cramming violations and help secure future compliance with the anti-cramming statute. Qwest argues that no cramming violation occurred and, therefore, a civil penalty should not be imposed.

STATEMENT OF THE CASE

On January 21, 2003, Mrs. Kay Stevens filed a written complaint with the Board alleging that Qwest had added an unauthorized charge of \$99 to her telephone bill for installation of a jack and wiring. She stated that her home had

previously been wired for a second line, but the service to that line had been dropped approximately a year before. She stated that when she called Qwest to ask the price for installing a second line, Qwest quoted her a price for the second line of a "one time" charge of \$15.52 plus regular monthly fees. When she received her monthly statement from Qwest, it contained a "one time" charge of \$15.52 for 2-line custom choice and an additional "one time" charge of \$99 for a jack and wiring. Mrs. Stevens stated she called Qwest on January 13, 2003, to ask about the charges. She stated that Qwest told her the charges were legitimate, but offered her a credit of one half the \$99 charge to resolve the matter. Mrs. Stevens refused the offer. Mrs. Stevens further stated she called Qwest several times and asked the price of adding a second line and was quoted several different prices, including \$10.71, \$33.95, and \$29.95, none of which included mention of additional charges. She stated she felt Qwest handled this poorly and unethically. She further stated that when the technician was in her home "maybe ten minutes," he never mentioned additional services/products needed or an additional cost. Ms. Stevens requested that the \$99 charge plus any taxes be reversed from her bill.

Upon receiving the complaint, Board staff attempted to informally resolve the dispute. On January 22, 2003, Board staff forwarded the complaint to Qwest for response.

Qwest responded by letter filed January 22, 2003. Qwest stated it reviewed the order and the notes on the account. Qwest stated that notes on the account

showed Ms. Stevens requested a technician even after she was told basic installation would not require a technician. Qwest stated the jack was added to the order at Ms. Steven's request. Qwest further alleged it is Qwest policy to quote jack charges when customers request extra work. Qwest further stated the order itself indicates that an offer was made to installment bill the charges, and that Qwest does not offer installment billing on charges as low as \$15.52. Qwest stated the actual cost of installing a second line to the network interface is \$33.95, not \$15.52. Qwest further stated the \$99 charge was valid. Qwest stated Mrs. Stevens was therefore underbilled by \$18.43. However, Qwest stated, since she was previously offered a one-half credit to satisfy, it would honor the previous offer. Qwest further stated total cost should have been \$132.95, and if Mrs. Stevens accepted the offer of a \$49.50 adjustment, the actual cost would be \$65.02. Qwest stated the \$10.71 charge Mrs. Stevens claims she was quoted is for the monthly charge on a second line. Qwest stated it regretted if there was a misunderstanding regarding the charges.

On January 24, 2003, Board staff issued a proposed resolution. The proposed resolution stated that Qwest indicated it regretted if there was a misunderstanding regarding the charges, that Qwest policy is to quote jack charges when customers request inside work in the home, and that notes on Mrs. Stevens' account indicated that Qwest offered to have the additional charges installment billed over a few months. The proposed resolution stated that Qwest indicated the correct cost of installing a second line without any inside work is \$33.95 and not the \$15.52 billed to

Mrs. Stevens, and that Qwest indicated it would still honor the offer of giving a one-half credit adjustment of \$49.50. The proposed resolution found that this was a reasonable solution. The letter informed Mrs. Stevens of the procedure if she disagreed with the proposed resolution. Mrs. Stevens did not challenge the proposed resolution.

The entire informal complaint file in this case, informal complaint file number C-03-21, is incorporated into the record in this case pursuant to 199 IAC 6.7.

On February 7, 2003, the Consumer Advocate petitioned the Board to commence an administrative proceeding to impose a civil penalty on Qwest. In its petition, the Consumer Advocate argued that Qwest's placing of the \$99 charge on the customer's telephone bill was a violation of Iowa's anti-cramming law, Iowa Code § 476.103. The Consumer Advocate further argued that the proposed resolution of the informal complaint file might be a reasonable solution to a private controversy without a public policy dimension, but it did not vindicate the public policy and statute against cramming. The Consumer Advocate requested a formal proceeding and argued a civil penalty should be imposed in an amount designed to deter future cramming violations by Qwest.

On February 27, 2003, Qwest filed a response to the Consumer Advocate's petition and a motion to dismiss the petition. Qwest argued that cramming involves the addition or deletion of a product or service on an account without the customer's verified consent. 199 IAC 22.23. However, Qwest argued, the customer specifically

directed Qwest to enter her premises and install a second line and a jack inside her home. Qwest alleged the Qwest technician remained in Ms. Stevens' home for nearly two hours to complete the installation. It further alleged that the customer informed the technician of the location of the jack, which was under a desk and required that a hole be sawed into the drywall to permanently install a dual jack. Qwest argued that it could not be reasonably maintained that Qwest imposed work on the customer without authorization or consent. In addition, Qwest stated the customer representative who communicated with the customer believes that he quoted the \$99 rate to her. Further details are contained in the response. Qwest argued that charging \$99 when the customer claims she was quoted a charge of \$15.52 is not cramming and denied it violated Iowa Code § 476.103. Qwest argued that even if it inadvertently misquoted the appropriate charge, the \$99 charge is in Qwest's catalog, and Qwest cannot charge rates different from the catalog prices to similarly situated customers. Qwest argued that since it offered to adjust the charge in compromise and Board staff accepted this as a reasonable resolution, the Consumer Advocate's continued challenge of the resolution was unreasonable. Qwest further argued that it appeared there was a miscommunication between Qwest and the customer, and miscommunication alone cannot support imposition of penalties for cramming. Qwest argued both the customer and the Consumer Advocate acknowledge Qwest was authorized to perform the work requested by the customer and to impose a separate charge, so there could be no cramming. Qwest

stated it had offered a \$49.50 adjustment, and further stated it would remove the equipment from the customer's premises without charge if the customer did not wish to accept the adjustment and pay the remaining amount. Qwest requested the Board to dismiss the case.

On March 4, 2003, the Consumer Advocate filed a reply memorandum. The Consumer Advocate argued that the complaint is not that Qwest charged Mrs. Stevens a rate different than the rate it quoted her for the jack installation, but that Qwest charged her \$99 for a jack installation that she did not need and did not authorize. The Consumer Advocate disputed Qwest's version of the facts, and stated that Mrs. Stevens alleged a jack was already in place, no jack installation was needed or authorized, and no jack was installed. According to the Consumer Advocate, Mrs. Stevens alleged the technician was at her home for no more than ten minutes. The Consumer Advocate argued this is a factual dispute and dismissal is inappropriate.

On January 8, 2004, the Board issued an order finding sufficient information to warrant further investigation, docketing the proceeding, and ordering the parties to submit a status report. On January 26, 2004, the parties filed a joint status report stating that each party adhered to its previously stated position.

On January 30, 2004, the Board issued an order finding the status report inadequate and assigning the case to the undersigned administrative law judge. On February 2, 2004, the Consumer Advocate filed a supplemental status report.

On February 5, 2004, the undersigned administrative law judge issued a procedural order and notice of hearing. Pursuant to that order, the parties filed a stipulation on February 19, 2004. The Consumer Advocate filed pre-filed direct testimony and exhibits of Mrs. Kay Stevens and a prehearing brief on February 26, 2004. Qwest filed pre-filed direct testimony and exhibits of Mr. Ben Klein, Mr. Scott A. McIntyre, and Mr. Mike Miller, and a prehearing brief, on March 11, 2004. The Consumer Advocate filed pre-filed rebuttal testimony of Mrs. Kay Stevens and Mr. Jim Stevens, data request responses, and a prehearing reply brief on March 18, 2004.

The hearing was held on March 24, 2004. Mr. Jim Stevens, witness for the Consumer Advocate, and Mr. Scott McIntyre, witness for Qwest, were connected to the hearing by telephone conference call. Mrs. Kay Stevens and her husband, Mr. Jim Stevens, testified on behalf of the Consumer Advocate. Mr. Richard B. (Ben) Klein, network technician, Mr. Scott McIntyre, staff director – public policy, and Mr. Mike Miller, supervisor – network operations and Mr. Klein's supervisor, testified on behalf of Qwest. Consumer Advocate Exhibits 1–6 were admitted. Qwest Exhibits BK-100, BK-101, SAM-102, SAM-103, SAM-104, and 105 were admitted. Qwest filed affidavits of Mr. Klein and Mr. Miller on March 24, 2004.

STIPULATION

On February 19, 2004, the parties filed a stipulation, in which they stipulated as follows:

1. Many months prior to December 2002, a second telephone line was installed in the home of James and Kay Stevens. According to Qwest, the installation was in August 1998. Stevens does not recall the precise time.

2. Prior to December 2002, the Stevens had discontinued service on the second line. According to Qwest, the discontinuance was prior to May 2001. Stevens does not recall the precise time.

3. According to Qwest, Kay Stevens called Qwest on February 25, 2002 to inquire about the price of installing a jack. According to Qwest, its records contain the following notation: "MRS [space] GV PRICE OF HRDJ1 WIL CL BK." According to Qwest, this notation means: "Mrs. called regarding the price of a jack and said she would call back." According to Qwest, the price of HRDJ1 is \$99 and includes the jack and inside wire and labor.

4. Stevens has no knowledge of Qwest's records and prior to preparation of this stipulation had not seen them. Stevens does not recall a call to Qwest on or about February 25, 2002. If she did place a call at or about that time, according to her, it would not have been to inquire about the price of installing a jack. According to Stevens, a dual jack was already in place at that time.

5. In late 2002, Kay Stevens telephoned Qwest to inquire about installing a second line. According to Qwest, the call was placed on November 27, 2002. Stevens does not recall the precise date of the call.

6. The parties disagree as to what charges were quoted for installation.

7. According to Stevens, the price Qwest quoted for installation was \$15.52, plus regular monthly fees. According to Stevens, no additional charges were mentioned.

8. According to Qwest, Qwest's representative believes the price he quoted for installation was \$99.00.

9. The parties disagree about what was ordered.

10. According to Qwest, a service order was issued to install a second line and a dual jack with a due date of December 3, 2002.

11. According to Stevens, she did not request and would not have requested installation of a jack, dual or otherwise, because a dual jack was already in place.

12. According to Qwest, the notation on Qwest's records, made by the employee who took the order for the second line on November 27, 2002 is as follows: "MRS. [space] CHK DD ADL LNE FOR COMPUTR ADVSD DISPATCH NO SD SHE WANTS SOMEONE TO SOME OUT AND ADD A DUAL JACK IN COMPUTER ROOM SO SHE CAN HAVE A PHONE NEXT TO COMPUTE." According to Qwest, this notation means: "Mrs. called and placed order for additional line and dual jack. Notation is that although it wasn't necessary to dispatch a technician to install the additional line, she wanted someone to come out to add a dual jack in the computer room so she could have the phone next to the computer."

13. According to Qwest, it was not necessary to dispatch a technician to only install a second line.

14. According to Qwest, the Qwest service order shows that dispatch by a technician was required and contains the following notation: "HRDJ1 JACKS GOES IN COMPUTER ROOM." According to Qwest, the equipment section of the service order shows that an additional line and a jack are to be installed.

15. According to Stevens, Qwest told her someone had to come out in order to make sure the second line was live.

16. A number of days later, a Qwest technician went to the Stevens home to work on the service order. According to Qwest, the date was December 3, 2002. Stevens does not recall the precise date.

17. The parties disagree on what was said at the time the technician came to the home.

18. According to Qwest, the technician introduced himself and had the customer show him where she wanted the new line and jack.

19. According to Stevens, the dual jack was already in place, and she had no reason to request installation of jack, dual or otherwise, and did not do so.

20. According to Qwest, after installing the line, in order to install the new dual jack, the technician had to remove an old existing single line jack that was used with the computer and cut a hole in the wall to accommodate the larger new dual jack under the desk where the computer was located. According to Qwest, doing so caused debris on the floor and the technician asked to borrow the customer's vacuum cleaner to clean up the mess. According to Qwest, after vacuuming, the technician explained to Kay Stevens how the new jack worked, moved the desk back and left.

21. According to Stevens, a dual jack was already in place and was not newly installed. According to Stevens, the technician did not borrow a vacuum cleaner. According to Stevens, there is and was no movable desk in the room, only immovable built-in cabinets.

22. The parties disagree on the length of time the technician was at the home.

23. According to Stevens, the technician was at the home approximately ten minutes.

24. According to Qwest's records, the technician was on the job one hour and 47 minutes.

25. Qwest's bill to James Stevens dated December 16, 2002, included a "ONE-TIME CHARGE FOR 2-LINE CUSTOMCHOICE" in the amount of \$15.52.

26. Qwest's bill to James Stevens dated December 16, 2002, included a "ONE-TIME CHARGE FOR FIRST JACK AND WIRING" in the amount of \$99.00.

At the hearing, Mrs. Stevens testified that there was a mistake in paragraph 21 of the stipulation. (Tr. 19-20, 31-32) She testified that the statement attributed to her that "there is and was no movable desk in the room, only immovable built-in cabinets" is incorrect. (Tr. 19-20, 31-32) She testified that, as shown in the foreground of Exhibits 1 – 3, there is a moveable desk in the room, although the rest of the cabinets are fixed. (Tr. 20, 32)

DISCUSSION OF THE EVIDENCE AND ANALYSIS

Qwest keeps records of each customer account that show each contact between Qwest and the customer. (Tr. 113-14) Customer account information is stored in several computer data systems that interconnect. (Tr. 114) The Business Office Support System (BOSS) maintains an entry for each occurrence when a customer account is accessed. (Tr. 114-15) The person accessing the customer account must enter the reason the account was accessed using a form of shorthand. (Tr. 115, 119-20) BOSS maintains only current records, and BOSS notes and other account information are downloaded at the end of each month for long-term storage to a second system called the Optical Storage Computer Output Application Replacement (OSCAR). (Tr. 115) OSCAR is a read-only storage database that can be accessed to review customer history. (Tr. 115, 132) The OSCAR records can be

looked at but they cannot be changed and no new entries can be made for past dates. (Tr. 115, 132)

Qwest's OSCAR records show that on February 25, 2002, Mrs. Stevens called Qwest and the Qwest employee who answered the call typed into the system that he or she gave Mrs. Stevens the price of a dual jack and that Mrs. Stevens would call back. (Stipulation # 3; Tr. 116, 120-21; Exhibit SAM-102) Although Mrs. Stevens does not recall a call to Qwest on or about February 25, 2002, and states if she did call, it would not have been to inquire about the price of installing a jack because a dual jack was already in place, this does not mean the call did not occur as shown on the Qwest record. (Stipulation # 4; Tr. 34-35, 116; Exhibit SAM-102) Since the Qwest record was created on February 25, 2002 as the call was being made, and could not be subsequently altered, it is the most persuasive evidence of what occurred. (Stipulations 3 and 4; Tr. 23, 114-15; Exhibit SAM-102) Since the record does not show what Mrs. Stevens said during the conversation, it is possible that Mrs. Stevens did not ask about the price of a dual jack, but that the price was quoted to her. (Tr. 120-23; Exhibit SAM-102; Stipulations 3 and 4) The record does not show what price was quoted to her. (Exhibit SAM-102) There is no recording of the telephone call. (Exhibit 6; Tr. 118-19)

One of the issues in dispute in this case is whether Mrs. Stevens ordered a dual jack to be installed in her home when she called Qwest on November 27, 2002.

Qwest's OSCAR records show that on November 27, 2002, Qwest sales representative Mr. Ryan Coon, located in Salt Lake City, answered a call from Mrs. Stevens. (Stipulations 5, 12; Exhibit SAM-102; Tr. 116, 123-24, 133-36, 138) Mr. Coon did not testify on behalf of Qwest because sales representatives such as Mr. Coon take 100–150 calls per day from customers and it is unlikely that Mr. Coon would recall any specifics of the conversation. (Tr. 133) Qwest's OSCAR record of the call shows that Mr. Coon typed in that Mrs. Stevens called to add an additional line for her computer. (Exhibit SAM-102; Tr. 116, 123-124, 134, 138; Stipulation # 12) The OSCAR record further shows Mr. Coon typed in that he advised Mrs. Stevens dispatch was not necessary but Mrs. Stevens said she wanted someone to come out and add a dual jack in her computer room so she could have a telephone next to the computer. (Exhibit SAM-102; Tr. 116, 123-124, 134-135; Stipulation # 12.) The OSCAR records do not reflect what price was quoted to Mrs. Stevens for installation of the dual jack and activation of the second line. (Exhibits SAM-102 and SAM-103) There is no recording of the telephone call. (Tr. 118-19; Exhibit 6) According to Qwest's tariff, the price of installing a dual jack and wiring is \$99. (Exhibit SAM-104)

Qwest's OSCAR records further show that the service order for Mrs. Stevens' home was for a dual jack that goes in the computer room. (Exhibit SAM-103; Tr. 116-17, 124; Stipulation # 14) It is not necessary to dispatch a technician to a

home or to go inside a person's home simply to activate a second line because the activation can be done from the central office. (Tr. 71, 81, 129; Stipulation # 13)

Mrs. Stevens testified she called because she wanted the second line reactivated for their computer. (Tr. 37, 47) She testified the female Qwest employee to whom she spoke was the one who said that someone had to come out. (Tr. 26; Stipulation # 15) Mrs. Stevens testified it was her understanding that something needed to be done in order to reactivate the line, that she did not know what, and that she did not ask her to add a dual jack because a dual jack was already there. (Tr. 26; Stipulation # 11) Stipulation # 15 says: "According to Stevens, Qwest told her someone had to come out in order to make sure the second line was live." Mrs. Stevens testified that Qwest quoted her a price for installation of \$15.52, plus regular monthly fees. (Stipulation # 7; Tr. 23, 39; original complaint filed 1/21/03)

Since the Qwest record was created on November 27, 2002, as the call was being made, and could not be subsequently altered, it is the most persuasive evidence of what occurred during the telephone call. (Stipulations 5, 9, 10, 11, 12, 14, and 15; Tr. 26, 114-17; Exhibits SAM-102, SAM-103) However, it is impossible to determine what price was quoted to Mrs. Stevens for the jack installation and activation of the second line during this call. It is possible there was a misunderstanding between the Qwest employee and Mrs. Stevens regarding the price. The undersigned does not find the evidence presented by one party on this point to be more persuasive than that presented by the other.

Another disputed issue in this case is what work was actually done when Qwest's technician, Mr. Ben Klein, came to Mrs. Steven's house on December 3, 2002, and how long he was at her home. (Stipulations 16 through 24; testimony of Mrs. Stevens, Mr. Klein; Exhibit BK-101)

Mr. Klein testified he performed wiring work and installed a dual jack in Mrs. Stevens' computer room. (Tr. 66-67) Before beginning the job, he entered information into Qwest's dispatch system while he was at Qwest's office in Carroll, Iowa. (Tr. 79-80, 84, 104) Mr. Klein does not enter the time he begins a job into the system. (Tr. 98, 103-04) At the time he entered the job information, the Qwest system automatically entered the time. (Tr. 98) Dispatch records are computer records that are made at the time of installation and cannot be backdated or changed after they are made. (Tr. 69) Qwest's dispatch records show Mr. Klein entered the information that he was beginning the Stevens job at 9:58 a.m. central standard time on December 3, 2002. (Tr. 70, 108-09; Exhibit BK-101) He left the Qwest office in Carroll and first went to a cross box to make a cross-connection. (Tr. 76, 80-81) He then drove to the Stevens house, went to the box in front of the house, and connected the buried service wire. (Tr. 80-81, 85) He testified he got to the Stevens' home sometime after 10:15 a.m. (Tr. 81) He testified he talked with Mrs. Stevens about the work he had been called to do, and that he was there to install a dual jack. (Tr. 68) He testified Mrs. Stevens told him where to install the jack, and he installed it at that location. (Tr. 68, 87) Mr. Klein testified there was an existing single jack at

the location where he installed the dual jack, that it was very loose and basically just hanging on, but that it was working. (Tr. 69, 76-77) He testified he had to cut a larger hole in the wall for the new bigger jack and made a mess on the floor. (Tr. 68-69) He testified he asked Mrs. Stevens for a vacuum cleaner, she got one for him, and he vacuumed the debris. (Tr. 68, 78-79) After installing the jack, it did not work, and he had to trace the inside wiring to determine why. (Tr. 68-69, 78) He testified he found two breaks that needed to be repaired, one on the backside of the garage, and one in a storage closet behind the wall where he installed the jack. (Tr. 69, 78, 85-86, 90-92) Once he repaired these, the jack worked. (Tr. 69) He then drove back to the Qwest office in Carroll and entered information that he had completed installation of the second line and a dual jack. (Tr. 70, 84, 104; Ex BK-101) It took him approximately five minutes to drive from the Stevens' home to the Qwest office in Carroll. (Tr. 84) Qwest's dispatch system shows a completion time of 11:46 a.m. central standard time. (Exhibit BK-101; Tr. 70, 98) Mr. Klein testified that if he were activating the second line and not installing the jack, he would not have entered Mrs. Stevens' home, and would not have gone inside her home to repair inside wire without her asking him to do so. (Tr. 81-82)

At the end of February or early March 2003, Mr. Klein's supervisor Mr. Miller told Mr. Klein that Mrs. Stevens had filed a complaint with the Board saying she was quoted a \$15 charge on a jack and instead was charged \$99. (Tr. 67, 107) Mr. Miller asked Mr. Klein to write down his best recollection of what he did and when he did it.

(Tr. 67, 89, 106-108) At that time, Mr. Klein wrote two pages of notes and drew a diagram of the exterior of the Stevens property and the interior of the Stevens home as they related to the work he had done. (Tr. 67, 88; Exhibit BK-100) Mr. Klein and Mr. Miller did not have access to the dispatch records at the time Mr. Klein prepared the notes in Exhibit BK-100. (Tr. 89-90, 105-06) Exhibit BK-100 shows Mr. Klein wrote a start time of 9:00 and an end time of 10:40 with a notation that all times were approximate. (Tr. 74; Exhibit BK-100) Mr. Klein testified he prepared the notes in Exhibit BK-100 over two months after the job without access to dispatch records, and the dispatch records would be more accurate with respect to the correct time. (Tr. 75-76, 81, 83-84)

Mrs. Stevens testified that the Qwest technician was in her home for approximately ten minutes. (Stipulation # 23; original complaint letter filed 1/21/03; Tr. 23, 40, 52) She testified a dual jack was already in place; she had no reason to request installation of a jack, dual or otherwise, and did not do so. (Stipulation # 17, 19, 21; Tr. 23, 27-30) Mrs. Stevens submitted photographs of her computer room showing the dual jack at issue with her prepared direct testimony. (Exhibits 1–5) She testified the technician did not borrow a vacuum cleaner. (Stipulation # 21; Tr. 23) In her rebuttal testimony, Mrs. Stevens testified the technician was not at her home very long. (Tr. 28) She also testified that she recalled she needed to go somewhere that morning, asked the technician if it would take him very long, and he said it would not. (Tr. 29, 41, 143, 147-148) She testified when the technician came

to her house, she showed him where the office was. (Tr. 39, 50) She testified he went into the closet behind the office, but she did not follow him there. (Tr. 40, 50) In her rebuttal testimony, Mrs. Stevens testified it was possible the Qwest technician repaired the two splices as he testified and that it was possible the technician took out a dual jack and installed another dual jack, although she didn't think so and it didn't make sense to her. (Tr. 28, 51, 54) She testified it was not possible that he took out a single jack and put in a dual jack. (Tr. 28) At the hearing, Mrs. Stevens testified Qwest did not install a dual jack on December 3, 2002, because a dual jack was already there. (Tr. 43) She testified she did not authorize a jack installation and a dual jack was already there. (Tr. 30, 43, 58) Mrs. Stevens' husband, Mr. Jim Stevens testified that a dual jack was in place at the location shown in Exhibits 1 through 5 prior to December 3, 2002. (Tr. 16-17)

At the hearing, for the first time, Mrs. Stevens testified she had reviewed her calendar for December 3, 2002, and there was a calendar entry for that date at 10 a.m. that showed she had an appointment to take her five-year-old son to basketball practice. (Tr. 41, 44, 52-53, 140, 143) She further testified she is sure she took her son to basketball practice on that date, that she was not confused about the time, and that she would not have been home at 10 a.m. (Tr. 41, 44, 53, 141-42, 146) She testified basketball practice would have been over at 11 a.m., so she would have left at 10:45 a.m. to pick up her son. (Tr. 141, 144) She testified she was sure the Qwest technician was at her home and completed his work before

she took her son to basketball practice. (Tr. 44, 56, 146-47) She testified she was sure that she did not take her son to practice, drop him off, return home, and then the Qwest technician came to her home. (Tr. 143) She testified she did not leave the technician at her home while she was gone. (Tr. 141, 144-45) Mrs. Stevens did not have her calendar showing the entry with her at the hearing. (Tr. 145) Mrs. Stevens acknowledged there was nothing about the calendar entry or basketball practice in her prepared direct and prepared rebuttal testimony. (Tr. 143, 147) She testified she had not told Mr. Graziano about the calendar entry prior to filing her prepared direct and rebuttal testimony. (Tr. 148-149) She testified she had told Mr. Graziano about the calendar entry within the last month, in February, and could not be more specific than that. (Tr. 148) Mr. Graziano clarified that Mrs. Stevens' rebuttal testimony was filed on March 18, 2004. (Tr. 148-149) Mrs. Stevens testified she had misspoken. (Tr. 149)

Mrs. Stevens' testimony regarding the calendar entry and taking her son to basketball practice is troubling. Although sometimes witnesses do not remember every detail regarding something that has occurred in the past, it is difficult to believe that such significant detail on a crucial issue was not remembered and brought to the attention of Mr. Graziano much earlier and included in the stipulation of the parties or Mrs. Stevens' direct testimony. It appears that Mrs. Stevens may have been attempting to bolster her case by the addition of last-minute details she thought

would lend credibility to her position. This testimony calls into question Mrs. Stevens' credibility with respect to her other testimony.

Because the Qwest dispatch records were created at the times in question on December 3, 2002, they cannot be backdated or changed, Mr. Klein did not enter the times himself, and the times were automatically entered by the computer into the dispatch system, the Qwest dispatch records are the most persuasive evidence of when Mr. Klein left the Carroll Qwest office to begin work on the Stevens job, and when he returned to the Qwest office after completing the work. (Exhibit BK-101; Tr. 69)

Mr. Klein's testimony regarding the work that was actually done at the Stevens' home is more persuasive than that of Mrs. Stevens. Mr. Klein's testimony is supported, although not absolutely proven, by the Qwest real-time records that cannot be changed or added to after-the-fact. (Exhibits BK-101, SAM-102, SAM-103) Mr. Klein has worked for Qwest for over 33 years, and has never been disciplined or admonished regarding his performance. (Tr. 64, 66, 70-71) This is the first time a customer has questioned something he has done. (Tr. 89) He did not receive a commission or other payment or reward for installing the dual jack and is paid on the same hourly basis regardless of the type of work done. (Tr. 71) Mr. Klein's supervisor has never seen or had any reason to believe Mr. Klein is not an exceptionally honest employee. (Tr. 94, 96) Mr. Miller testified Mr. Klein does not cut corners, is respectful to customers and highly competent, his conduct is above

reproach, he is a perfect model of a hard-working employee, and he has never been subject to disciplinary action. (Tr. 96) Mr. Klein's explanation of the difference in the start and end times on the notes he made regarding the Stevens job and the Qwest dispatch records is reasonable. (Exhibits BK-100, BK-101) Mr. Klein's testimony and exhibits regarding the work he performed are internally consistent, are consistent with the Qwest records that show the work that was ordered, and make sense. (testimony of Mr. Klein; Exhibits BK-100, BK-101, SAM-102, SAM-103)

Mrs. Stevens testified it was possible that Mr. Klein made the wiring repairs as he claimed and that it was possible he took out one double jack and put in another, although she did not think so and it did not make sense. (Tr. 28) Mrs. Stevens' testimony that Mr. Klein was in her home for approximately ten minutes is not consistent with the time it would take him to make the wiring repairs and replace the jack, and is not consistent with the real-time Qwest dispatch records. Mr. and Mrs. Stevens' testimony that a dual jack was already in place prior to the time Mr. Klein came to their home is inconsistent with the real-time Qwest records that state Mrs. Stevens requested that a dual jack be installed on November 27, 2002. Their testimony is inconsistent with the fact that Qwest did not need to dispatch a technician or go inside the Stevens' home merely to reactivate the second line. (Tr. 71, 81, 129) Mrs. Stevens' credibility is open to question based on her hearing testimony regarding the basketball practice appointment.

Mr. Klein's testimony regarding the work he did at the Stevens' home is more persuasive than that of Mrs. Stevens. Therefore, the undersigned finds that Mr. Klein performed the wiring work and installed the dual jack in the Stevens home on December 3, 2002, as he testified.

Qwest's billing the Stevens \$99 for the dual jack was not cramming within the definition of Iowa Code § 476.103 and 199 IAC 22.23(1). A civil penalty should not be imposed, since no cramming occurred.

The proposed resolution by staff dated January 24, 2003, found that Qwest's offer of a one-half credit adjustment of \$49.50 was a reasonable solution. The undersigned agrees. It is impossible to determine what price was quoted to Mrs. Stevens for the jack installation on either February 25, 2002, or November 27, 2002, and it is entirely possible there was a misunderstanding regarding the applicable price. Given the particular facts of this case, it is reasonable to split the difference.

FINDINGS OF FACT

1. On November 27, 2002, Mrs. Stevens called Qwest to add an additional telephone line for her computer. (Exhibit SAM-102; Tr. 37, 47, 116, 123-124, 133-136, 138; Stipulations 5, 12) The Qwest sales representative advised Mrs. Stevens that dispatch was not necessary but Mrs. Stevens said she wanted someone to come out and add a dual jack in her computer room so she could have a telephone next to the computer. (Exhibit SAM-102; Tr. 116, 123-124, 134-135; Stipulation 12)

2. It is impossible to determine what price was quoted to Mrs. Stevens for the jack installation. (Exhibits 6, SAM-102; Tr. 118-19)

3. On December 3, 2002, Mr. Klein activated a second telephone line, repaired inside wiring, and installed a dual jack at the Stevens home. (Exhibits BK-100, BK-101; testimony of Mr. Klein, Mr. Miller)

CONCLUSIONS OF LAW

1. Qwest did not violate Iowa's anti-cramming statute or the Board's rules when it charged the Stevens \$99 for installation of a dual jack. Iowa Code § 476.103; 199 IAC 22.23(1).

2. Qwest should not be assessed a civil penalty. Iowa Code § 476.103.

3. Under the particular facts of this case, it is reasonable for Qwest to provide the Stevens a credit on their telephone bill of \$49.50 for one-half the price of the dual jack, if it has not already done so.

IT IS THEREFORE ORDERED:

1. A civil penalty is not assessed.

2. If it has not already done so, Qwest must provide the Stevens a credit of \$49.50 on their telephone bill for one-half the cost of installation of the dual jack within 30 days of the date of this decision.

3. This proposed decision will become the final order of the Board unless the Board moves to review it or a party files written notice of appeal with the Board within 15 days of its issuance. 199 IAC 7.8.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 14th day of April, 2004.